**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **SYLVIA J. TABRON**<br>Claimant<br>VS.<br><br>**COLGATE PALMOLIVE COMPANY**<br>Respondent<br>AND<br><br>**TRAVELERS INSURANCE COMPANY**<br>Insurance Carrier<br>AND<br><br>**KANSAS WORKERS COMPENSATION FUND** | Docket No. 176,684 |

## ORDER

Claimant appeals from an Award entered August 4, 1995 by Administrative Law Judge Alvin E. Witwer. The Appeals Board heard oral argument on December 19, 1995 by telephone conference.

### APPEARANCES

Claimant appeared in person and by her attorney, Keith L. Mark of Mission, Kansas. Respondent and its insurance carrier appeared by and through their attorney, James E. Martin of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Debera A. Erickson of Kansas City, Kansas.

### RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award of the Administrative Law Judge and adopts the stipulations enumerated therein.

### ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits based upon a fifteen percent (15%) whole body functional impairment and held the respondent and its insurance carrier responsible for the entire Award. On appeal claimant asks for review of the findings and conclusions of the Administrative Law Judge

regarding the nature and extent of claimant's disability, including work disability. The respondent raises the issue of the liability of the Kansas Workers Compensation Fund.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified to grant claimant permanent partial general disability benefits based upon a seventy-six percent (76%) work disability from the date she took early retirement from her employment with the respondent on August 5, 1993.

The Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those in their entirety herein. The Appeals Board approves and adopts those findings and conclusions to the extent they are not inconsistent with the findings and conclusions set forth herein.

Briefly stated, claimant worked for respondent from July 1983 until August 1993 when she took early retirement. Claimant testified that due to the injuries she sustained at work she was no longer able to continue performing her job duties. Those duties included repetitively loading boxes weighing from five to fifteen (5-15) pounds, which included overhead work, as well as work requiring bending, twisting and lifting. She moved anywhere from seven hundred to over one thousand (700-1,000) boxes during an eight (8) hour work day. Beginning in the winter of 1992 and continuing through the spring of 1993 she experienced a lot of pain and discomfort in her shoulders, right hand and forearm and her left knee. She picked the dates of December 10, 1992 through February 12, 1993 as her alleged dates of accident because that is when she had the worst pain. During this period of time claimant's job was known as a reshipper. The parties stipulated to personal injury by accident by a series of accidents culminating on February 12, 1993.

The record as to claimant's medical history is somewhat sketchy. None of the treating physicians were deposed. However, it appears that in December of 1992 the respondent authorized Dr. O'Mailey to treat claimant's shoulders, knee and right upper extremity. She was discharged from his care on February 4, 1993 without restrictions. She subsequently treated with several physicians including Drs. Glaser, Katta, Koprivica, Lewis, Baker, Wood and Cook. She was seen by an orthopedic surgeon, Dr. Mark Maguire in July 1993. At some point during the summer of 1993 the claimant was placed on light-duty restrictions, either by Dr. Maguire or Dr. Fred Wood. Thereafter, she was seen again by Dr. O'Mailey about July 14, 1993. At that time he said she could continue unrestricted work. It appears from the record she then resumed her duties of a reshipper up until the time that she left her employment with the respondent.

About this same time during which claimant's injuries occurred and she was receiving medical treatment for those work-related injuries, the respondent company was going through a process of downsizing and a period of layoffs. They offered their employees several different options including the early retirement, for which claimant opted. Claimant's testimony that she took early retirement because her physical problems prevented her from doing her job duties is uncontroverted in the record. "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive." Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, Syl. ¶ 2., 558 P.2d 146 (1976).

Because hers is a "non-scheduled" injury, claimant is entitled to permanent partial general disability benefits pursuant to the provisions of K.S.A. 1992 Supp. 44-510e. That statute provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

In this case the stipulated accident date is February 12, 1993. The claimant continued to work for the respondent until August 5, 1993. The record indicates that claimant was off work receiving temporary total disability compensation during part of that time and that during part of that time she was performing light-duty work. Nevertheless, she was also employed by respondent performing her regular job for her regular pay during some of this period. Accordingly, the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e should apply until the date claimant took early retirement because of her injuries on August 5, 1993. Thereafter, the Appeals Board finds the presumption has been overcome. Even though the claimant chose to take early retirement and thereby, in effect, voluntarily removed herself from the open labor market, the uncontroverted evidence in the record establishes that the claimant could not have continued her work for the respondent due to her injuries. Furthermore, claimant's exercising of her option to accept early retirement was in lieu of a general layoff which likewise, would have forced her out into the open labor market. There is no evidence in the record which would indicate that there was a job available which the claimant could perform with the respondent, or otherwise, which would have continued to pay her a comparable wage after August 5, 1993. Her work disability will then be measured as the extent to which her ability to perform work in the open labor market and to which her ability to earn a comparable wage has been reduced.

Claimant was examined on April 4, 1994 by orthopedic surgeon Edward J. Prostic, M.D., at the request of her attorney. In his opinion, claimant had sustained injuries to her shoulders, right hand and left knee. He diagnosed osteoarthritis of the acromioclavicular joint, tendinitis of the shoulders and anterior impingement syndrome of the shoulders. It was also his opinion that claimant had median and ulnar nerve entrapment at the right hand, and patellofemoral difficulties of the left knee. He recommended she avoid significant use of her hands above shoulder height, that she avoid forceful or repetitious use of either hand and avoid the use of vibrating equipment. In respect to claimant's knee, he would further recommend that she avoid significant squatting and climbing. After reviewing a description of her job duties as a reshipper with the respondent, he advised that she not return to those duties.

The claimant introduced the testimony of a vocational rehabilitation consultant, Mr. Gary Gammon, on the issue of work disability. Utilizing the information obtained from claimant regarding her work and educational background, together with the medical opinions of Dr. Prostic as to specific work restrictions, he determined that claimant would be restricted from all of the light and medium physical demand level jobs. It is his opinion that claimant has a 78.75% labor market access loss. Mr. Gammon further testified that he considered claimant to retain the ability to earn between minimum wage and five dollars ($5.00) per hour. He compared the five dollar ($5.00) per hour figure to the average weekly wage of seven hundred seventy-one dollars and seventy-eight cents ($771.78) per week and concluded that the percentage of claimant's loss of ability to earn a comparable wage was approximately seventy-five percent (75%). The Appeals Board finds that by applying these numbers the actual percentage of loss is closer to seventy-four percent (74%).

The Administrative Law Judge declined to accept these opinions concerning loss of access to the open labor market and wage loss by Mr. Gammon. In his opinion, Mr. Gammon's percentages were too high and the evaluation somewhat flawed. Be this as it may, the Appeals Board finds Mr. Gammon's opinions to be uncontroverted and are not so improbable or unreasonable as to be deemed untrustworthy and disregarded in their entirety. Accordingly, the Appeals Board accepts the opinion testimony of Mr. Gammon as to claimant's percentage of loss of access to the open labor market and ability to earn comparable wages. Applying the formula approved by the Kansas Supreme Court in the case of Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), giving each factor equal weight, the Appeals Board finds claimant to have sustained a work disability of seventy-six percent (76%).

Much is attempted to be made by respondent's counsel concerning the fact that Dr. Prostic's examination pre-dated the surgery to claimant's right hand. When asked whether he would anticipate the surgery might improve claimant's condition and possibly change the restrictions that he placed upon her, Dr. Prostic answered, “It is possible that I would alter my opinion of her permanent impairment and that I would alter her restrictions.” (Prostic depo. p. 38). He admitted that although he knew very well what claimant's condition was on April 4, 1994, he did not know what her condition had become since then. (Prostic depo. p. 41). However, after Dr. Prostic reviewed the portions of the claimant's regular hearing testimony which discussed the surgery and the effect of that surgery on her condition, Dr. Prostic testified that he would not change the hand restrictions that he placed upon her. (Prostic depo. p. 63). While it would have been preferable had the record contained testimony from the physician that performed the hand surgery on claimant and/or a follow-up examination by Dr. Prostic, the Appeals Board finds the testimony of Dr. Prostic to be uncontroverted and, accordingly, should be regarded as conclusive. It is accepted by the Appeals Board as credible evidence of the claimant's physical condition and appropriate work restrictions.

The second issue upon which review has been requested is the question of the Workers Compensation Fund's liability. The Administrative Law Judge found that respondent and its insurance carrier had not met their required burden of proof relative to establishing the liability upon the Kansas Workers Compensation Fund. For the reasons expressed below, the Appeals Board agrees with this finding by the Administrative Law Judge that, except for its attorney fees, the Kansas Workers Compensation Fund should be relieved of all liability. Claimant indicated that she had problems with her shoulders in 1988 or 1989. There is some indication in the record that claimant may have made some general complaints about her shoulders to individuals at work, including the plant nurse and supervisors. However, there is no testimony as to specifically when those complaints were made, to whom or what was said. There is also no indication that these shoulder complaints affected claimant's job performance or that her job duties were in any way modified as a result of such complaints. The only testimony on this subject comes from the claimant herself. The employer does not present any evidence that anyone in a supervisory capacity for the respondent was aware of a preexisting impairment or handicap. No Form 88 was filed by the respondent with the Division nor was there evidence of any prior reported accident.

When Dr. Prostic was asked about the claimant's medical history, he responded that claimant denied preexisting disease in her musculoskeletal system or medical problems that would lead to musculoskeletal complaints. The significance of this to him in evaluating claimant was that claimant's history indicated that her condition was not an aggravation of a preexisting disease or a problem that was acquired outside the workplace. According to Dr. Prostic, claimant advised him that she started having problems with her right shoulder in December of 1992. She, thereafter, developed complaints in her left shoulder, left knee and both hands. (Prostic depo. pp. 7 & 8). Furthermore, Dr. Prostic stated in his deposition that he was not asked to prepare a report that would pertain to Fund

apportionment and so he did not elicit the information from the claimant that he would need in order to render such an opinion. (Prostic depo. p. 34).

The Fund argues that the evidence does not support a finding that claimant was a handicapped employee prior to the series of accidental injuries, which is the subject of this claim, nor that her preexisting shoulder injury contributed to her ultimate disability with respect to her shoulders, right upper extremity and left knee. Therefore, the Fund argues, the respondent has failed in its burden of proving that the respondent had knowledge that claimant was a handicapped employee prior to the subject accident and has not established that she suffered from a preexisting condition which would constitute a handicap in her obtaining or retaining employment.

K.S.A. 44-566(b) defines a "handicapped employee" as follows:

> "`Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:
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> "15. Loss of the use of any member of the body;
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> "17. Any other physical impairment disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

Other than claimant's mention of shoulder complaints, the record is devoid of evidence that claimant was handicapped in the sense that her preexisting shoulder complaints were of such a nature and extent that they would constitute a handicap in her obtaining employment or reemployment. The fact that claimant was able to continue her employment with the respondent from the onset of shoulder complaints of 1988 or 1989 up until the time of her present injury is evidence to the contrary.

An employer is relieved of liability for compensation awarded to a handicapped worker under certain circumstances. In the event the employer is relieved of this liability, the responsibility is assessed either partially or totally to the Fund by K.S.A. 1992 Supp. 44-567(a):

> "An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof . . . ."

The statute requires that the employer knowingly employ or retain the handicapped employee. This is the central issue in this case. The record fails to establish the respondent "knowingly" retained a handicapped worker.

K.S.A. 1992 Supp. 44-567 requires, before compensation can be paid from the Workers Compensation Fund, that there be a finding that the disability "probably or most likely would not have occurred but for the preexisting physical . . . impairment . . . ." Respondent argues that the mere fact that this claim was pleaded as an accident resulting

from a series of traumas or mini-traumas culminating on February 12, 1993 means, *ipso facto*, that claimant's condition is a result of aggravation of preexisting conditions. An aggravation could not occur but for the preexisting physical impairment and that Fund liability is thereby established. This argument fails on at least two counts. First, there is no evidence that claimant possessed a preexisting condition at any specific point in time, only evidence that symptoms were present. It cannot be said from the evidence in the record that these "prior" or "preexisting" symptoms constituted either an impairment or a handicap. Second, there is no evidence in the record apportioning any part of the claimant's ultimate impairment to any such preexisting condition. Dr. Prostic specifically declined to give an opinion as to apportionment and there is no other evidence in the record upon which such an apportionment could be made. See Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). The Appeals Board finds that there is insufficient evidence in the record to support a conclusion either that claimant was a handicapped employee or that claimant's injury and resulting disability would not have occurred but for a preexisting physical impairment. By the same token, there is no evidence that there was any preexisting impairment which contributed to the claimant's ultimate disability. The record is simply insufficient to find any liability on the part of the Workers Compensation Fund for this award.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer dated August 4, 1995, is hereby modified to find a work disability of 76%.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Sylvia A. Tabron, and against the respondent, Colgate Palmolive Company, and its insurance carrier, Travelers Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury which occurred February 12, 1993 and based upon an average weekly wage of $771.78, for 22.29 weeks of temporary total disability compensation at the rate of $299.00 per week or $6,664.71, followed by 2.57 weeks at the rate of $77.18 per week or $198.35 for a 15% permanent partial general disability for the 24.86 week period from February 13, 1993 through August 5, 1993 less the 22.29 weeks of temporary total disability, thereafter followed by the period beginning August 6, 1993 for 311.49 weeks at the rate of $299.00 per week of $93,136.94 for a 76% permanent partial general body work disability with the total award not to exceed $100,000.00.

As of December 29, 1995, there is due and owing claimant 22.29 weeks of temporary total disability compensation at the rate of $299.00 per week or $6,664.71, followed by 2.57 weeks of permanent partial general disability compensation at the rate of $77.18 in the sum of $198.35, and 125.14 weeks of permanent partial general body disability compensation at the rate of $299.00 per week, or $37,416.86, for a total of $44,279.92, which is ordered paid in one lump sum less any amount previously paid. The remaining balance of $55,720.08 is to be paid at the rate of $299.00 per week, until a total sum of $100,000.00 is fully paid or further order the Director.

Future medical treatment is to be paid upon proper application and approval by the Director.

Fees necessary to defray the expense of the administration of the Workers Compensation Act for the State of Kansas is assessed against the respondent and its insurance carrier as follows:

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| Richard Kupper & Associates | $452.30 |
| Hostetler & Associates, Inc. | $233.05 |

Gene Dolginoff Associates $971.35

**IT IS SO ORDERED.**

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

**Dissent**

I must respectfully dissent from the majority in this matter. K.S.A. 1992 Supp. 44-510e states in part:

> "There shall be a presumption that the employee has no work disability if the employee engages in work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

In this instance, claimant was returned to work by Dr. O'Mailey on July 14, 1993 without restriction. After returning to work, claimant worked for a period of time, unrestricted, at her regular employment until such time as she voluntarily elected to seek retirement. At the time of claimant's retirement there was no medical information restricting claimant from performing her normal job duties. As such, I do not believe the presumption contained in K.S.A. 1992 Supp. 44-510e has been overcome and claimant, in this case, is entitled to her functional impairment only.

BOARD MEMBER

c: Keith L. Mark, Mission, Kansas
James E. Martin, Overland Park, Kansas
Debera Erickson, Kansas City, Kansas
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director